

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 61919-5-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
ROBERT LEWIS CASTLE,	)	
	)	
Appellant.	)	FILED: August 3, 2009
_____	)	

Appelwick, J. — Castle appeals his convictions for attempting to elude and driving under the influence. He contends the court erred by not instructing the jury on the lesser included offense of failure to obey an officer, warranting a new trial on the attempting to elude conviction. Because the evidence does not support an inference that the lesser crime was committed, the lesser included offense instruction was not warranted. He also contends the court erred by failing to suppress his refusal to take a breath test. The trial court properly denied Castle's motion to suppress. We affirm.

### FACTS

On the evening of January 6, 2007, Trooper Gregory Heider was alerted

of a potentially drunk driver by another driver travelling behind Robert Castle. In his unmarked patrol car, Trooper Heider caught up to Castle as he exited onto State Route (SR) 527, in Snohomish County, Washington. SR 527 is a five lane road. Trooper Heider observed the vehicle moving from side to side, as if it was fighting to stay in the lane. He also observed that the vehicle's speed varied between 20 and 50 mph, where the speed limit was 35 mph. Troop Heider activated his lights as Castle approached SR 96, where there would be an easy area to pull over. The vehicle did not come to a stop, but continued southbound. Trooper Heider then activated his siren, but the vehicle still did not come to a stop. It continued southbound, eventually stopping at a red light. At the stop light, Trooper Heider used his public address system at least four times to ask the driver to pull over. When the light turned green, the vehicle continued southbound.

Trooper Sean O'Connell advised Trooper Heider that he was coming to provide support, and would try to intersect them at some point. When the vehicle stopped at another red light, Trooper Heider asked the vehicle to pull over again. Trooper O'Connell arrived, driving a marked patrol vehicle, and positioned his car just shy of the driver's side door. As Trooper O'Connell came to a stop, Castle drove out and around the marked patrol car and accelerated through the red light. At this point, the two patrol cars were officially in pursuit, with Trooper O'Connell assuming the primary position, directly behind Castle's vehicle. Trooper Heider observed the other traffic on SR 527 move out of the

vehicle's path. The vehicle would accelerate up to 60 mph, slow back down, and then, as it approached the intersection at 164th Street, it slowed to about 30 mph for a red light but continued through. Castle again accelerated up to 60 mph, and then began to slow again. At the point Castle decelerated to a speed at which the troopers were allowed to employ a pursuit immobilization technique (PIT) without a sergeant's approval, Trooper O'Connell performed the PIT maneuver. Castle's vehicle rolled to a stop.

Both troopers drew their guns and gave verbal commands to the occupants to exit the vehicle. Trooper Heider took Castle into custody. Trooper Heider read Castle his rights, and informed him he was under arrest for attempting to elude and driving under the influence (DUI).

On the way to jail, Castle told Trooper Heider that he was reluctant to take the breath test, as he did not trust the blood alcohol content machine. He stated he wanted his own blood test. During the suppression hearing, Trooper Heider speculated that he probably told Castle they would offer him a breath test, and then "if he wanted to . . . he could pay to have his own blood tested." During his testimony at trial, Trooper Heider recalled that he probably told Castle they would first offer him a breath test, and then they would "deal with the blood test."

At the jail, Trooper Heider read Castle the implied consent warnings from the standard DUI arrest report. Castle declined to submit to a breath test. Trooper Heider then took Castle to have a blood test performed. The State was not involved in the private blood draw in any other capacity than transporting

Castle to and from the hospital. The hospital destroyed the blood sample, consistent with its policy of discarding samples if payment of \$100 is not received within 72 hours of the test.<sup>1</sup> On April 23, 2007, the State charged Castle with attempting to elude a police vehicle and driving under the influence.

Castle moved to suppress the evidence that he had refused to take the breath test. The basis for the motion was an issue with the standard implied consent warning for breath tests. At the suppression hearing, Castle moved to dismiss the charges based on a different ground: Trooper Heider's allegedly improper statements that Castle would have to pay for his own blood test. The court reserved the issue for trial, as it had not been briefed.<sup>2</sup> The court's findings of fact entered after the suppression hearing stated that Castle was properly informed by the implied consent packet, and that he had failed to demonstrate prejudice based on the information given to him.

During motions in limine, Castle told the court that he might bring a motion to dismiss later in the case based on Trooper Heider's alleged statement to Castle that he would have to pay for his own test.

At trial, Castle asked the court to dismiss the driving under the influence charge, due to Trooper Heider's alleged assertion to Castle that he would pay for his own blood tests. The court denied the motion, finding that there was insufficient evidence to suggest that Trooper Heider told Castle that he would

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<sup>1</sup> However, Trooper Heider recalled that hospital staff told Castle he would need to return within 24 hours.

<sup>2</sup> The last finding of fact from the suppression hearing states: "The issue of whether Trooper Heider informed the Defendant that he had to pay for his own private blood draw was not briefed and is not addressed by this court. That issue is reserved for the trial judge."

have to pay for the test.

During the colloquy concerning the jury instructions, Castle asked the court to instruct the jury on the lesser included offense of failure to obey an officer. The court denied the request

The jury returned a verdict of guilty for both charges. The court imposed a standard range sentence of 29 months for the attempting to elude conviction, and 365 days for driving under the influence, to run consecutively.

Castle timely appealed.

## DISCUSSION

### I. Lesser Included Offense

Castle argues the trial court erred when it denied his request to instruct the jury on the lesser included offense of failing to obey an officer.

A trial court should instruct the jury on a lesser included offense if two conditions are met. State v. Workman, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). First, under the legal prong, each of the elements of the lesser offense must be necessary elements of the offense charged. Id. at 447–48. Second, under the factual prong, the evidence in the case must clearly support an inference that the defendant committed the lesser crime. Id. at 448. Under this second prong, a defendant is entitled to a lesser included offense instruction if, construing the evidence in a light most favorable to him, a jury could find the lesser offense was committed instead of the charged offense. State v. Allen, 127 Wn. App. 945, 950, 113 P.3d 523 (2005).

We review de novo the legal prong of a request for a jury instruction on a lesser included offense. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). We review a trial court's refusal to give a requested instruction, when based on the facts of the case, for an abuse of discretion. Id. at 771–72. A trial court abuses its discretion if it bases its decision on an erroneous view of the law or applies an improper legal standard. State v. Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

The necessary elements of failure to obey a police officer are necessary elements of attempting to elude, and the State concedes this point.<sup>3</sup> State v. Gallegos, 73 Wn. App. 644, 652, 871 P.2d 621 (1994).

However, even construing the evidence in a light most favorable to Castle, it is inconceivable that a jury could find that he failed to obey an officer, rather than attempted to elude. The cornerstone of the attempting to elude statute is reckless driving while attempting to elude, as opposed to the failure to obey statute, where the focus is on whether the person willfully fails to stop. RCW 46.61.022, 024(1). The record is replete with evidence demonstrating

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<sup>3</sup> The failure to obey statute reads: “[a]ny person who wilfully [sic] fails to stop when requested or signaled to do so by a person reasonably identifiable as a law enforcement officer . . . is guilty of a misdemeanor.” RCW 46.61.022. The attempting to elude statute reads:

Any driver of a motor vehicle who wilfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1).

Castle's recklessness. Castle reached speeds of 60 mph in a 35 mph zone at various points in the pursuit. He ran a red light after Trooper O'Connell positioned his car by the driver's side door, pulling out and around the patrol car to do so. There was traffic on SR 527 that had to move out of Castle's path. Castle ran another red light at 30 mph, before Trooper O'Connell decided to employ a PIT.

The trial court did not abuse its discretion in refusing to give the lesser included offense instruction.

## II. Suppression of Breath Test Evidence

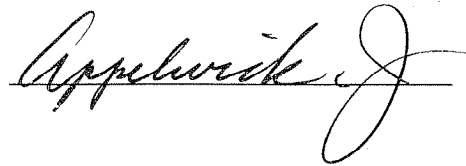
Castle contends that the trial court erred by denying his motion to suppress his refusal to submit to a breath test. Specifically, he argues that Trooper Heider's statement to him about paying for additional testing is grounds for a new trial in which his refusal to take the breath test is suppressed.

The implied consent statute gives drivers who submit to the breath test the right to additional tests administered by a qualified person of the driver's choosing. RCW 46.20.308(2); State v. Bartels, 112 Wn.2d 882, 886, 774 P.2d 1183 (1989) (citing former RCW 46.61.506(5) (1989)). This procedure allows a driver "to obtain evidence with which to impeach the results of the state-administered test." Bartels, 112 Wn.2d at 885.

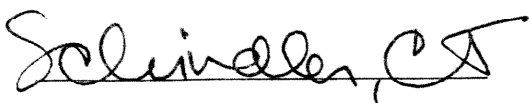
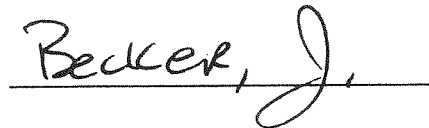
There is no dispute that Trooper Heider correctly read the implied consent warnings advising Castle that he had the right to additional tests. However, when Trooper Heider responded to Castle's request for a blood test, he

incorrectly informed Castle he could obtain the test but at his own expense. As stated in Bartels, an officer's "addition of the words 'at your own expense' to an otherwise proper informed consent warning prevents an indigent defendant from making a properly informed decision whether or not to submit to a blood alcohol content test." Id. at 889. However, because Castle has not established that he is indigent, he has not established that Trooper Heider's statement prejudiced him.

We hold that the trial court did not err in declining to suppress Castle's refusal to take the breath test. We affirm.

A handwritten signature in cursive script, reading "Appelwick, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, reading "Schindler, C.J.", written over a horizontal line.A handwritten signature in cursive script, reading "Becker, J.", written over a horizontal line.